88 - 1556

No.

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In The

Supreme Court of the United States

October Term, 1983

MICHAEL ADAMS,

Petitioner,

vs.

PROVIDENCE & WORCESTER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Petitioner was seriously injured while working for Respondent Railroad and sued for damages under the Federal Employers' Liability Act. At trial, Petitioner introduced, in addition to other evidence of liability and injury, a letter from Respondent's General Manager making clear that Petitioner's condition disqualified him from further employment with Respondent.

The jury found Respondent liable for Petitioner's lost earning capacity, and the trial judge denied Respondent's motion for a new trial.

1. Did the Court of Appeals properly discharge its appellate function in reversing the District Court and holding the disqualification letter inadmissible on the basis of its own construction of the letter's factual significance?

2. Even if the letter was properly held inadmissible and the District Court's Judgment for Petitioner on the earning capacity issue properly reversed, did the Court of Appeals err in ordering Judgment for Respondent on the earning capacity issue, rather than a new trial, even though Respondent had not moved below for a judgment notwithstanding the verdict?

3. Did the Court of Appeals err in granting Judgment for Respondent on the earning capacity issue, despite the existence of other evidence that demonstrated impairment of Petitioner's earning capacity?

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PROVIDENCE & WORCESTER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Michael Adams, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit, entered in this proceeding on November 23, 1983.

OPINIONS BELOW

The United States Court of Appeals for the First Circuit's order denying the petition for rehearing is unpublished, and is reproduced here at 23a. The First Circuit's opinion reversing and remanding the case is reported at Adams v. Providence and Worcester Co., 721 F.2d 870 (1st Cir. 1983), and is reproduced here at 14a. The opinion of the United States District Court for the District of Massachusetts (Tauro, D.J.) denying the defendant Railroad's motion for a new trial is reported at Adams v. Providence & Worcester Co., 564 F. Supp. 1373 (D. Mass. 1983), and is reproduced here at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 23, 1983. A timely petition for rehearing was denied on December 19, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 45, Section 51 reads as follows:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign

> nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT OF THE CASE

The petitioner, Michael Adams, was employed by the Providence and Worcester Company (Railroad) as a freight trainman, a heavy manual job involving throwing switches, making freight car couplings, and turning on and off heavy brakes to move freight cars around the Railroad's Yard in Worcester, Massachusetts. On August 16, 1977, the couplers of a boxcar and tankcar failed to couple automatically upon impact. Adams was forced to walk between the cars and manually adjust the couplers. As he was opening the coupler on the boxcar, the tankcar rolled forward, causing the couplers to close together and crush a finger of Adams' right hand. Adams could not pull his hand free, but he was able to radio the engineer, who moved the train so as to separate the couplers and release Adams' hand.

Adams reported the injury and went to a hospital where he received immediate medical attention. Nevertheless, his finger later became gangrenous, and he underwent a first, and then a second, partial amputation.

Adams returned to work on November 2, 1977. After a short period, he was able to resume his previous duties. Adams had received full wages during the period he was out of work and full compensation for medical expenses. On August 15, 1980, however, Adams sought recovery under the Federal Employers' Liability Act (FELA) for his other losses from the accident, including damages for pain and suffering and for impaired earning capacity because of the lost digit. Adams' complaint reads as follows:

> As a result of the said accident, the plaintiff was made sick, sore and lame and has suffered great pain of body, anguish of mind and will so continue to suffer for an indeterminate period of time in the future; .... that as a result of the said accident, the plaintiff had been incapacitated and prevented from engaging in his employment, and that the plaintiff will continue to be so incapacitated in the future; ....

On August 28, 1980, the day after the complaint was served on the Railroad, the Railroad's General Manager, Orville Harrold, removed Adams from service. Harrold informed Adams by letter that the basis for the removal was the high degree of responsibility rail companies bear for the protection and safety of the public and Railroad employees (25a). Harrold indicated that, in

his judgment, it was inappropriate for a trainman who, after suffering an accident, believes he is suffering from pain, mental anguish, or an incapacity to continue working in such a sensitive occupation. Harrold's letter of August 28, 1980, removing Adams quotes the allegations of Adams' FELA complaint and then reads:

> In view of the above representation of your physical and mental condition, that you have made through your attorney, and the fact that your physical and mental condition is responsible for the safety of private citizens and fellow employees, I find it necessary to remove you from train service immediately. (25a)

In trial testimony, Harrold explained his decision of August 28, 1980 more fully:

> . . . I felt that, certainly, Mr. Adams is the best judge of his own physical condition and, certainly, I couldn't let anybody operate trains carrying dangerous cargoes, crossing crossings with school buses and various other peoples. If he tells me that he is mentally and physically incapacitated, regardless of what a doctor would say, I would still have to abide by the decision I made that I couldn't allow him out on those trains. (Tr. at 97).

Following the medical disqualification, Adams continued to press his FELA action, although increasing the amount of damages sought for his future incapacity in consequence of the Railroad's conclusion that his claim renders him unfit for future service. Thus, in this action Adams sought to recover damages for pain and suffering,

past lost wages, and future impairment to earning capacity (measured as the difference between Adams' earning capacity prior and subsequent to the injury).

Independently, Adams challenged the propriety of the Railroad's medical disqualification of him. He proceeded, first, with informal discussions with supervisors, then obtained aid from a union representative, and finally filed a formal grievance under the Railway Labor Act (RLA), 45 U.S.C. §153 First (i), seeking reinstatement with back wages. Pursuant to this action, Adams has claimed — and repeated the claim at the trial (Trs. at 37) — that his injuries should not disqualify him from performing his tasks as a trainman.* Adams' FELA action came to trial first.

Prior to trial, in deposition, Orville Harrold, now President of the Railroad, stated that the Railroad would lift Adams' medical disqualification if Adams were to declare that he is fit and able to perform his duties (Trs. at 83-84). On October 22, 1982, prior to the trial, Adams sent a letter to Harrold providing such a declaration (26a-27a). At trial, however, Mr. Harrold testified that he currently refuses to allow Adams to seek certification of fitness from a Railroad physician. Mr. Harrold's testimony reads:

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* As discussed infra at 16-17, the legal issues in Railway Labor Act and FELA cases are distinct, and the statutes are administered so as to avoid any form of double recovery by claimants.

> But initially I did consider sending him [Adams] to a doctor, but after I thought about it and decided that I would still have to make the decision no matter what the doctor said after I did suspend him, I didn't consider it any further, the year and a half since then, of sending Mr. Adams to a doctor. (Tr. at 97).

Thus, the Railroad's medical disqualification of Adams has remained in effect from August 28, 1980 to the present day.

At the trial, the jury was presented various forms of evidence that demonstrated (occasionally graphically) the character of Adams' disability resulting from the accident. Adams was asked to display the missing digit to the jury (Trs. at 38). On both direct and cross-examination, he was asked to provide detailed descriptions of the manual character of his job as trainman — including the tasks of manually throwing heavy switches, forcing open locked couplers, and hand-turning freightcar brake mechanisms (Trs. at 12-26, 44-76, 89-90) — and of the manual jobs he was able to hold after his medical discharge from the Railroad (Trs. at 34-36, 80). In addition, on direct and cross-examination Adams engaged in extensive hand-drawing on a chalkboard concerning the relative positions at various times of himself, his crew, and the railcars (Trs. at 16-17, 59-60). Adams is right-handed and thus completed these chalk drawings with the hand that was injured in the accident in full view of the jury (Plaintiff's Exh. 4).

Hospital reports were introduced indicating, variously, some diminished sensation in the injured hand, some enhanced tenderness, the need for physical therapy, and the risk of further amputation (Id.).

With respect to future earning capacity, Adams testified that he began working as a trainman directly after high school, and has no other occupational training or skills. At the time of the injury and at the time the Railroad removed him from service, Adams was earning a guaranteed annual wage as a trainman of $31,697. (Trs. at 11). In light of President Harrold's testimony that the Railroad refused and would continue to refuse to lift the medical disqualification, the plaintiff thought it unnecessary to introduce more specific evidence concerning the effect of the injury on his future as an employee of the Railroad. It was established at trial, however, that, after being removed from train service, Adams applied to dozens of employers without obtaining steady work. Adams accepted odd jobs when he could find them, and in 1982 was hired for a construction job which paid him $5.00 per hour (Trs. at 34-36; 80)

The evidence at trial showed that the difference between Adams' Railroad salary and his actual earnings from the time of the medical disqualification until the time of trial was $67,800 and that the difference between Adams' guaranteed earnings as a trainman and his future expected earnings as a construction worker was over $20,000 per year (9a; 564 F. Supp. at 1377). Given his age

at trial of 26 years, Adams had a work expectancy of at least 30 years (Id.). The Railroad introduced no evidence with respect to alternative earnings available to Adams' over the remainder of his worklife.

During trial, the Railroad objected to the introduction as evidence of Orville Harrold's letter of August 28, 1980 informing Adams of the Railroad's grounds for removing him from service, and also objected to Adams' letter of October 22, 1982 declaring that he was sufficiently fit to have the medical disqualification lifted. The Railroad attempted to introduce an April, 1982 letter from the Railroad to Adams purporting to terminate him for alleged picket line misconduct despite the fact he had already been medically disqualified by the Railroad. Because the picket line charges were the subject of separate judicial proceedings, District Judge Tauro excluded their introduction (6a; 564 F. Supp. at 1376).

The Railroad failed to move for a directed verdict, and the jury found that Adams' injury resulted from the Railroad's negligence under the FELA, 45 U.S.C. §51 et seq., and from the Railroad's violation of the Safety Appliance Act, 45 U.S.C. §1 et seq. The Railroad failed to move for a judgment notwithstanding the verdict. Judgment was entered on December 17, 1982, in the amount of $625,000, plus statutory prejudgment interest of $157,227.40.

After entry of the judgment, the Railroad moved for a new trial on the grounds of the erroneous introduction of Orville Harrold's letter of August 28, 1980 and of Michael Adams' letter of October 22, 1982, and of the failure to allow introduction of the purported termination letter of April 1982. Judge Tauro's decision denying the motion for a new trial directly addresses the relevancy and competency of this evidence. The Judge held:

> the letter states . . . that the railroad was removing Adams on the basis of his physical and mental condition caused by his on-the-job injury. It is thus a clear statement of the position that the railroad was taking as to the effects of Adams' injury (4a; 564 F. Supp. at 1375).

Judge Tauro held relevant on similar grounds Adams' letter of October 22, 1982, which declared his fitness in order to obtain a lifting of the medical disqualification:

> This letter, like the earlier letter, directly addressed the issue of Adams' physical condition, and the railroad's position on this issue . . . . [Harrold's] testimony, in conjunction with the letter, served to clarify the parties' positions on a central issue in the case, namely the effect of Adams' injury on his physical condition. (5a-6a; 564 F.Supp. at 1376).

Finally, Judge Tauro held that the letter purporting to terminate Adams for an alleged picket line infraction was properly excluded "because it had no relevance to Adams' physical condition" and because it

was the subject of separate judicial proceedings under the RLA (6a; 564 F. Supp. at 1376).

Judge Tauro also examined the facts supporting the jury's award of damages for lost wages, future impairment of earning capacity, and pain and suffering, and concluded that the size of the award did not warrant a new trial (9a-10a; 564 F.Supp. at 1377).

Although the Railroad had not moved for a judgment notwithstanding the verdict, the United States Court of Appeals for the First Circuit overturned the jury's award of damages for lost wages and future impairment of earning capacity and remanded the case for trial on the limited issue of Adams' damages for physical pain and mental anguish (22a; 721 F.2d at 873).

The Court of Appeals concluded that admission of the Orville Harrold letter of August 28, 1980 removing Adams from service because Adams' "physical and mental condition is responsible for the safety of private citizens and fellow employees" was likely to cause confusion and result in prejudice (21a; 721 F.2d at 872). Presumably, the Court believed that the letter would lead the jury to award damages for wrongful discharge, rather than for the loss to earning capacity from the FELA injury (19a; 721 F.2d 872 at n.4).

The Court of Appeals ruled that, absent the Harrold letter, Adams had introduced no evidence of impairment to earning capacity (21a; 721 F.2d at 873). The Court of Appeals regarded Adams' testimony that he

believed his injuries did not merit disqualification as well as the fact that Adams had resumed his prior duties as a trainman sometime after the injury, to provide conclusive proof that Adams, lost digit or not, would suffer no future loss of earnings (20a-21a; 721 F.2d at 872-73). The Court of Appeals did not address the non-documentary evidence of incapacity or impairment, including Adams' display of the lost digit, the hand-drawing during trial, the hospital reports, the testimony concerning the job tasks Adams had performed, and his actual earnings after the Railroad disqualified him and Orville Harrold's testimony concerning the medical disqualification.

Based upon its ruling that the Railroad's medical disqualification of Adams was irrelevant, and its interpretation that the evidence provided no support for lost earning capacity, the Court of Appeals reversed the District Court and remanded the case for a new trial solely on Adams' claim for damages for physical pain and mental anguish (22a; 721 F.2d 873). The Court of Appeals did not address the approporiateness of its mandate in light of the Railroad's failure to move below for a judgment notwithstanding the verdict.

On December 19, 1983, the Court of Appeals summarily denied Adams' petition for rehearing (24a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals exceeded the bounds of proper appellate review in holding inadmissible Respondent's letter explaining to the Petitioner why his mental and physical condition necessitated his removal from any future employment as a trainman.

a. The relevance of Respondent Railroad's letter of August 28, 1980

In an FELA action, damages for the loss of future earnings are calculated by determining the difference between the amount the victim would have earned over his or her expected worklife if he or she had not been injured and the amount he or she could expect to earn given the injury. McWeeney v. New York, N.H. & H. R.R. Co., 282 F.2d 34, 35, (2d Cir. en banc), cert. denied, 364 U.S. 870 (1960). Thus, typically, the victim will introduce evidence showing how the injury caused some (usually permanent) physical disability that affects his or her earnings' potential. In the present action, there is no factual issue as to Petitioner Michael Adams' permanent physical disability — the lost digit.

The Respondent Railroad concluded that Adams' physical and mental condition as a result of the injury rendered Adams unsuitable for further service with the Railroad. The Railroad communicated this policy to Adams in Orville Harrold's letter of August 28, 1980. The letter, and the Company policy embedded in it, indicate

that Adams' future expected earnings no longer include potential earnings from the Respondent Railroad. As a consequence, to measure loss of future earnings from the injury, Adams must demonstrate his expected earnings over his worklife in the next best alternative occupation available to him.

It follows that the Court of Appeals committed clear error in reversing the District Court for allowing the letter to be admitted as evidence. Orville Harrold's letter of August 28, 1980, accompanied by Harrold's testimony at trial that the Railroad policy excluding Adams from future service remains in effect, is crucially relevant evidence of Adams' limited economic horizons resulting from his injury.

If evidence of company policies with respect to workers injured or claiming injury were generally unavailable as evidence in FELA actions, proof of damages for lost earning capacity would become speculative, because of the limited information that juries would have. In FELA actions involving loss of earning capacity, juries must make use of the actual and specific employment opportunities available to claimants if they are to avoid speculative estimates of the consequences of permanent physical disabilities. The Railroad's letter and President Harrold's confirming testimony made it clear that Adams could not regard the Respondent Railroad as a potential employer. Adams testified — without contradiction — that he began

working as a trainman directly after high school and has no other occupational training or skills. As a consequence, the demonstration that the principal railroad employer in his community enforces a policy rendering persons suffering injuries such as his unemployable is centrally relevant to his demonstration of the effect of the injury on his future earnings.

The Railroad, like any FELA defendant, has ample opportunity to introduce evidence of alternative occupations that Adams may have ignored in his job search. Indeed, the Railroad had the opportunity to introduce evidence — if any were available — of other railroads' employment policies that would not exclude from employment individuals with injuries or claims of injuries such as Adams'. The Railroad failed to offer any such evidence. But it would be clear error — as it was — for a court to rule evidence of such policies inadmissible, whether introduced by a plaintiff or defendant, since such evidence must be among the most probative evidence of the actual effect on earnings' potential of an injury or a claim of injury such as Adams.

b. <u>The possible prejudice to the Respondent from the admission of the letter</u>

The Court of Appeals held that the confusion and prejudice caused by the letter outweighed its probative value. (21a; 721 F.2d at 872). Although the opinion is not completely clear, it appears that the Court of Appeals

believed, first, that the letter would cause confusion and prejudice by raising in the minds of the jury that Adams' claim was for wrongful discharge, rather than for FELA damages. (Id. at n. 4). Second, the Court of Appeals concluded that there was no probative value to the letter whatsoever, (20a-21a; 721 F.2d 872). This conclusion followed from the Court of Appeals' interpretation of the letter as evidence exclusively of the injury to Adams' earning capacity rather than as evidence of the effect of the injury on the range of employment opportunities available to Adams.

FELA injury actions and RLA wrongful discharge actions are clearly distinguishable in terms of both legal and factual issues. Most types of discharges from employment do not even remotely implicate FELA issues, and the employee's only remedy is to pursue a grievance action under RLA procedures. For example, where an employee receives a disciplinary discharge, there is no issue of damages resulting from injuries. Even where an employee receives a medical discharge, if the source of the medical disability is unrelated to employer negligence, the only remedy available to the employee is under the RLA.

In contrast, where an employee suffers an FELA injury which results in a medical disqualification, the employee may simultaneously bring an FELA damages action and an RLA wrongful discharge action. In the RLA wrongful discharge action, the employee seeks

reinstatement and back wages, and must claim that the injury should not prevent him from engaging in his employment. In the FELA action, the employee requests damages resulting from the injury. Whatever the plaintiff may think of his ability to work, the policies adopted by his actual and potential employers are clearly relevant evidence of the degree of those damages. Both the RLA and the FELA are administered so as to prevent any form of double recovery by a claimant. Through the doctrine of estoppel, RLA tribunals and FELA courts routinely adjust remedial orders in response to earlier employee recoveries in the alternative tribunal. Moreover, the administration of both FELA actions and RLA grievance actions are sensitive, if not vigilant, to attempts to gain contradictory or duplicative recoveries before the other tribunal. See, e.g., Hodges v. Atlantic Coast Line Railroad Co., 363 F.2d 534, 539 (5th Cir. 1966), and Award No. 6479 (NRAB).*

Simultaneous FELA injury and RLA discharge actions are not contradictory. It is not contradictory to claim damages for an actual injury, and to also claim that the injury is not so serious as to compel removal from

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* This distinction between the RLA and FELA shows that the District Court properly excluded all evidence of the Railroad's purported dismissal of Adams for alleged picket line misconduct on April 28, 1982, over a year and a half after the Railroad disqualified Adams for medical reasons. Evidence solely of a discharge unrelated to an FELA injury is relevant only to RLA grievance actions.

service. Although a worker medically disqualified on the basis of an FELA injury is free to bring simultaneous FELA and RLA actions, he is not obliged to do so. The worker may decide to disregard the medical disqualification and pursue only his FELA remedy. In an FELA action, damages for lost earning capacity would be measured as the difference between the worker's earnings prior and subsequent to the injury and medical disqualification. The worker's pre-disqualification earnings would establish the first figure. The worker's potential earnings in other occupations would establish the second. The fact of the medical disqualification itself would be a necessary evidentiary foundation, not of the fact of injury to earning capacity, but of the fact of the consequences of such an injury, because it would show that the worker can no longer expect to receive wages from his former employer.

The Court of Appeals believed that the Harrold letter constituted the only evidence of injury to earning capacity presented by Petitioner, and that the Petitioner was relying upon the technical legal argument that, absent any other evidence showing injury, the Railroad's letter should be regarded as an admission against interest of the fact of injury. (20a; 721 F.2d at 872).

Concededly, the District Court opinion in one passage does refer to the Harrold letter as an "admission", and states that "An admission in a party's pleadings is taken as established regardless of whether it

has any factual basis." (4a-5a; 564 F. Supp. at 1375). In various other passages, however, the District Court makes clear that the evidentiary value of the letter is that it establishes the relationship between Adams' FELA injury and his medical disqualification (Id.).

> "The letter states, however, that the railroad was removing Adams on the basis of his physical and mental condition caused by his on-the-job injury. It is thus a clear statement of the position that the railroad was taking as to the effects of Adams' injury." 564 F. Supp. at 1375, and later added:
>
> ". . . the letters which were admitted, together with the testimony of Mr. Harrold and Adams, established that (1) Adams was injured while on the job, (2) the defendant removed Adams from service on the grounds that he was medically disqualified to perform his duties, (3) Adams sought reinstatement but the defendant refused to lift the medical disqualification and continued that refusal at trial." 564 F. Supp. at 1376.

These later passages in the District Court's opinion are the more probative of its evidentiary rulings. More importantly, even if the District Court employed the term "admission" with insufficient precision, that usage alone ought not defeat Adams' legitimate FELA claim. Petitioner's claim does not require that the letter constitute a legal admission of the fact of injury. As shown, infra, at pages 27-32, substantial evidence was introduced to demonstrate loss of capacity that was

completely unrelated to the letter, in particular the open display of the mutilated finger and the use of the finger in a chalkboard exercise directed by Respondent's counsel. The Harrold letter and testimony were relevant to establish the fact that Michael Adams must look to other employers for future earnings. Because of his injury, Adams can no longer satisfy the Railroad's policy requiring certain minimum physical and mental conditions for employment as a trainman.

c. The importance of clarification by this Court of the scope of appellate review of factual issues

The error committed by the Court of Appeals in its reading of the Harrold letter and its ruling on the letter's admissibility is sufficiently serious in its own right to merit action by this Court. But more importantly, the Court of Appeals' decision represents a clear failure on its part to remain within the bounds of proper appellate review.

In a number of recent cases, this Court has emphasized the limited scope of appellate review of factual issues. Pullman-Standard v. Swint, 465 U.S. 273, 287-93 (1982); Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 856-58 (1982). The problem here is related, but more subtle. First, as the Court of Appeals itself admitted (20a; 721 F.2d at 872), trial court rulings on the admissibility of evidence are normally left to the discretion of the District Court and may not be reversed

except for abuse of that discretion. Wright & Graham, Federal Practice and Procedure: Evidence §5224. The above account has demonstrated clearly that the District Court did not abuse its discretion. Second, as the Court of Appeals apparently failed to recognize, many evidentiary rulings depend on factual findings relating to the characterization of that evidence. See Fed. R. Evid. 104(b). These preliminary facts are often entrusted to the jury as well as to the judge. Fed R. Evid. 104(b) advisorry committee note; Wright & Graham, supra, §5054. Thus, a reviewing court must determine not only whether a particular evidentiary ruling was an abuse of discretion, but also whether the underlying factual findings upon which it was based were clearly erroneous. Wright & Graham, supra, §5053 at 264.

In this case, the District Court, and we must assume the jury as well, believed that Harrold's letter was motivated by a company policy holding that workers who were injured or claimed injury could not adequately perform their duties and were not qualified to continue working. (4a, 6a; 564 F. Supp. at 1375, 1376). The Court of Appeals believed that the letter was motivated by one or more of a number of other reasons, including the fear of third-party liability (18a-19a; 721 F.2d at 872). Even if the Court of Appeals' interpretation of the facts were more convincing than it is, there is no ground for holding that the District Court's interpretation was clearly erroneous. This Court should use this opportunity to

clarify the standard of review appropriate in such cases and reverse the judgment of the Court of Appeals.

2. Even if the letter was properly held inadmissible, the Court of Appeals committed serious error, in conflict with the opinions of this Court and the practice of other Courts of Appeals, by ordering judgment for Respondent on the earning capacity issue rather than ordering retrial of the entire action

In its post-trial motions before the District Court, Respondent did not ask for a judgment notwithstanding the verdict on the earning capacity issue. Rather, it quite properly moved for a new trial in which evidence of the Railroad's medical discharge of Adams would be excluded. In Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947), this Court held that, in the absence of a motion in the District Court for a judgment notwithstanding the verdict, a Court of Appeals "was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." Id. at 218.

Cone, like this case, involved a decision by a Court of Appeals that "certain evidence offered by the petitioner . . . was prejudicial error," and that "without that improperly admitted evidence petitioner's proof was not sufficient to submit the question . . . to the jury." Id. at 214. Nevertheless, this Court held that, by directing a judgment for respondent, the Court of Appeals had deprived the District Court of its "primary discretionary

responsibility," id., at 218, to consider whether "the ends of justice would best be served by allowing petitioner another chance," id., at 217. The rule in Cone was reiterated and extended in Globe Liquor Co. v. Roman, 332 U.S. 571 (1948) (in absence of Rule 50(b) motion, appellate court should not direct judgment, though district court had directed jury's verdict), and Johnson v. New York, 344 U.S. 48 (1952) (motions to set aside verdict and for new trial no substitute for Rule 50(b) motion). See Wright & Miller, Federal Practice and Procedure: Civil §2540 at 613. It remains at least the announced practice of most of the Courts of Appeal. Wright & Miller, supra, §2540 at 613-14.

The rule announced in Cone is supported by a number of important policy considerations. First, as emphasized in Cone, it reserves to the District Court, which is more familiar with the facts and relative strengths of each party's case, the initial opportunity to decide whether a judgment notwithstanding the verdict is an appropriate response to the improper admission of certain evidence at trial. Second, it prevents the respondent from indirectly circumventing, through the mere vehicle of bringing an appeal, the strict 10-day time limit contained in Rule 50(b) on the bringing of a post-trial motion for a judgment notwithstanding the verdict.

Finally, and perhaps most importantly, it prevents serious unfairness to the winner in the District Court. When a party moves the District Court for a judgment

notwithstanding the verdict in addition to, or instead of, a motion for a new trial, the verdict winner has the opportunity to demonstrate how, even if the initial jury verdict was tainted by improperly admitted evidence, other evidence admitted at trial, or even entirely different evidence premised on a different theory of the case, could support a favorable verdict in a new trial. Cf. Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967); Note, Post-Verdict Motions Under Rule 50: Protecting the Verdict Winner, 53 Minn. L. Rev. 358, 371 (1968). If no motion for judgment notwithstanding the verdict is made, no opportunity for such a demonstration is presented, and neither the District Court nor the Court of Appeals can have the benefit of such argument. Indeed, the importance of allowing the verdict winner to urge a new trial rather than a judgment notwithstanding the verdict has been cons' ered so important that Fed R. Civ. P. 50(c)(2) grants the verdict winner the right to move for a new trial even after the trial court's grant of his opponent's motion for a judgment notwithstanding the verdict. Fed. R. Civ. P. 50(c) advisory committee note. Because of the Court of Appeals' unwarranted action in this case, however, that important opportunity was foreclosed.

The error of the Court of Appeals was so egregious in this case that it might, ironically, tempt this Court to think of this as one of those cases illustrating the proposition that this Court "is not primarily concerned

with the correction of errors in lower court decisions." R. Stern & E. Gressman, Supreme Court Practice, §4.18 (5th Ed. 1978). There are, however, a number of reasons why either a grant of the petition for certiorari or a summary vacation of the Court of Appeals' judgment is warranted and necessary. First, this Court has not in recent years had the opportunity directly to reaffirm the principles established in Cone, Globe, and Johnson. Second, the Court of Appeals may have erroneously believed that this Court's decision in Neely, which concerned itself with the discretion of a Court of Appeals to direct the entry of judgment in cases in which a motion for a judgment notwithstanding the verdict had been filed in the District Court, somehow eroded the importance of adhering to the decision in Cone.* Third, the Court of Appeals may have thought Cone to be distinguishable because, in this case, a new trial was allowed on some of the elements of damages raised in the complaint.

Thus, just as Globe and Johnson were necessary to make clear the precise extent of the rule in Cone, so it is necessary at this time to clarify whether the rule in Cone forbids the Court of Appeals from directing partial as well as complete judgments when no motion for a judgment notwithstanding the verdict was made in the

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* In fact, Neely explicitly reaffirmed and distinguished Cone.

District Court. Finally, this Court has recently renewed its interest in more exactly defining the proper relationship between the Courts of Appeals and the District Courts, see Pullman-Standard v. Swint, 465 U.S. 273 (1982), Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982), and this case provides another opportunity for extending that inquiry in an important and consequential direction.

Even if Respondent had moved for a judgment notwithstanding the verdict before the District Court, Neely makes clear that, although a Court of Appeals reviewing the denial of such a motion has some discretion to direct judgment itself rather than remanding the matter to the District Court for it to determine whether a new trial is appropriate, that discretion is highly circumscribed. "[A]n appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b)." 386 U.S. at 325. That this standard was to be taken seriously was confirmed in Iacurci v. Lummus Co., 387 U.S. 86 (1967), decided shortly after Neely, in which this Court reversed a Court of Appeals' decision to direct the entry of judgment rather than remand to the District Court. 387 U.S. at 88. In this case, as will be demonstrated below, there was a wealth of evidence, other than the purportedly inadmissible letter, from which the jury might have found Respondent liable for depriving Petitioner of significant future earning

capacity. Moreover, if Petitioner had not relied to the extent that he did on the disqualification letter, he could have introduced other evidence, including evidence of the effects of physical disability on the advancement of Railroad employees, lifetime earning schedules, etc., pointing in the same direction.

Apparently, the combination of Neely and Iacurci has not provided a sufficient guide to the Courts of Appeals in exercising the limited discretion afforded them. The grant of certiorari by this Court, or perhaps more appropriately, a summary reversal or vacation of the Court of Appeals' judgment, will do much to resolve that confusion.

3. Even if the letter was properly held inadmissible, the Court of Appeals erred in granting Judgment for Respondent on the earning capacity issue, ignoring substantial evidence available to the jury, besides the letter, that demonstrated the Petitioner's injury and loss of earning capacity.

It is well established that an appellate court may reverse a jury decision and enter judgment for one of the parties only if there is no evidence whatsoever in the record supporting the jury's decision for the opposing party. An appellate court, of course, may find some portion of the evidence presented to the jury to be prejudicial, and so compel reversal of the judgment. But the appellate court may enter judgment on its own in favor of one party or another, only if there is no evidentiary foundation whatsoever for a judgment for the opposing party.

In the instant action, the Court of Appeals concluded that, absent the Harrold letter, and in the context of the Petitioner's frank testimony that he thought he was fit enough to continue work, the Petitioner had presented no evidence of impairment of future earnings. The Court of Appeals states directly:

> He [the Petitioner] did have a claim for loss of earnings after August 29, 1980, only if he proved some diminution of earning capacity after the date of the termination. There was no such proof. (21a; 721 F.2d at 873).
>
> . . . he [the Petitioner] is not entitled to damages for loss of future earnings because his future earning power was not impaired. (21a; 721 F.2d at 873).

The Court of Appeals' entry of judgment for Respondent is clearly erroneous and must be reversed. The Petitioner introduced, besides the letter, seven distinct items of evidence, some by oral testimony, some easily observed by the jury, others purely documentary, that together provide sufficient grounds for a jury to evaluate the extent to which the injury impaired the Petitioner's future earning capacity:

1. A description of the precise character of pre-injury and post-injury job tasks. Petitioner testified in substantial detail — never contradicted — about his education, about his specific skills, training, and about the jobs he had held in his relatively short worklife (Trs.

at 10-12). Furthermore, Petitioner testified in detail about the particular tasks that he performed on a daily basis: what he did, what his responsibilities were, what switches he had to pull and brake levers to engage (Trs. 12-26, 44-76, 89-90). He also testified about the character of his manual labor in non-railroad occupations (Trs. 34-36, 80).

2. The display of the lost digit to the jury. The jury was able to gain a clear view of the extent of finger lost and the remaining mobility and flexibility of the digit (Trs. at 38).

3. The display of the digit in action in a manual task. During trial, in full view of the jury, the Petitioner exhibited his ability to draw on a chalkboard — as well as he could — with his right (mutilated) hand, in response to specific instructions of the Respondent's counsel (Trs. at 16-17, 59-60). The trial record, of course, cannot possibly capture for an appellate court the extent of Adams' difficulty in drawing, the number of times and contexts in which Adams dropped or fumbled with the chalk, or the representational accuracy of the drawings in comparison to each juror's own experience.

4. A documentary hospital report indicating a recommendation that the Petitioner undergo physical therapy. (Plaintiff's Exh. 4: Memo. dated 8/29/77).

5. A documentary hospital report indicating the risk of future amputation of the digit. (Plaintiff's Exh. 4: Memo. dated 8/29/77).

6. A documentary hospital report indicating the diminished sensation of the injured digit. The jury could infer a greater sensitivity or cautiousness in manual activities that could affect the speed and accuracy with which the Petitioner could complete work tasks over the remainder of his career. (Plaintiff's Exh. 4: Memo dated 10/4/77).

7. A documentary hospital report indicating tenderness in the tip of the mutilated digit. Again, in conjunction with direct visual observation of the Petitioner's use of the digit in hand-drawing on a chalkboard, this medical statement could implicate lost earning capacity. (Plaintiff's Exh. 4: Memo. dated 10/4/77).

As a result, because there was substantial evidence, totally independent of the letter and testimony regarding the discharge, from which the jury could reasonably and plausibly evaluate the Petitioner's lost earning capacity from the injury, the Court of Appeals erred in granting judgment for Respondent rather than a new trial on the earning capacity issue.

CONCLUSION

Accordingly, for the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit, or, in the alternative, the Circuit Court's judgment should be vacated and remanded with instructions to reinstate the jury verdict (with costs and interest), or, in the alternative, the Circuit Court's judgment should be vacated and remanded with instructions to order a new trial.

Respectfully submitted,

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DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. CA 80-2537-T

MICHAEL ADAMS,
Plaintiff
v.
PROVIDENCE AND WORCESTER COMPANY,
Defendant.

May 27, 1983

George J. Cahill, Jr., New Haven, Conn., for plaintiff.

Joseph F. Ryan, Lyne, Woodworth & Evarts, Boston, Mass., for defendant.

MEMORANDUM

TAURO, District Judge.

This is a personal injury case, in which the plaintiff's finger was crushed between two railroad cars owned by the defendant. After a jury verdict in favor of the plaintiff, defendant moved under Fed. R. Civ. P. Rule 59 for a new trial, and for relief from judgment pursuant to Rule 60(b)(6).

I. Background.

The plaintiff, Michael Adams, is a former employee of the defendant railroad. On August 16, 1977, Adams was working as a trainman, and was attempting to get two railroad cars to couple automatically. When he was unable to get the cars to couple by themselves, he went between the cars to attempt to set the couplers by hand. While Adams' hand was on the coupler of one of the cars, the other car rolled into the coupler and crushed part of his finger. The top half of his finger was subsequently amputated. Adams was out of work, except for one day, from the date of the injury until November 2, 1977. During this time, he received his full wages. Adams then returned to his job, and after a short period of time resumed his full duties.

On August 15, 1980, Adams filed this suit, under the Federal Employer's Liability Act (FELA), 45 U.S.C.

§§51 et seq., the Safety Appliance Acts (SAA), 45 U.S.C. §2, and the common law. The day after the complaint was served, the railroad removed Adams from service, on the ground that he was medically unfit for continued work. Adams was never returned to service, and was subsequently terminated for alleged picket line misconduct. Notwithstanding this subsequent termination for non-medical reasons, the railroad has never lifted the medical disqualification under which Adams was originally removed from service.

After trial, a jury found the railroad liable under the FELA, the SAA and common law negligence. The jury awarded $625,000 in damages. It also found that Adams was 20% contributorily negligent. Under the FELA, however, when a violation of the SAA is shown, no diminution of damages on account of contributory negligence is allowed. 45 U.S.C. §53. On December 17, 1982 judgment was entered for Adams in the amount of $625,000 plus $157,277.40 in prejudgment interest.[1]

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[1] The jury awarded only the $625,000 in damages. In entering judgment, the court added prejudgment interest to this award. Defendant has moved to strike the award of prejudgment interest, and this motion is discussed in Section III, infra.

II. Motion for New Trial.

The railroad moves for a new trial on the grounds that (1) certain evidentiary rulings were erroneous and prejudicial, (2) the jury verdict was excessive, and (3) the evidence showed that Adams' accident was caused by his own negligence.

A. Evidentiary Rulings.

The railroad contends that it was prejudiced by the erroneous admission of two letters offered by Adams, and the exclusion of a letter offered by the railroad. The first contested letter was from Orville Harrold, then general manager of the railroad, to Adams, dated August 28, 1980, removing Adams from service. The railroad sought to exclude this letter on relevance grounds, arguing that it bore only on the question of wrongful termination. The letter states, however, that the railroad was removing Adams on the basis of his physical and mental condition caused by his on-the-job injury. It is thus a clear statement of the position that the railroad was taking as to the effects of Adams' injury.

The railroad argues that the letter is not competent evidence of Adams' physical condition, in that Mr. Harrold made no independent investigation of Adams' condition. This argument misses the legal import of opposing party admissions. An admission in a party's

pleadings is taken as established regardless of whether it has any factual basis. Similarly, a party-opponent admission is not considered hearsay, regardless of whether the statement exhibits any indicia of reliability. See Fed. R. Ev. Rule 801. Mr. Harrold testified at trial that the railroad still had not lifted the medical disqualification it had placed on Adams in the August 28, 1980 letter. Under those circumstances, that letter was clearly relevant and admissible.

The second letter was from Adams to Mr. Harrold, dated October 22, 1982. Mr. Harrold had been asked, in deposition and at trial, what Adams would have to do to get his medical disqualification lifted. Mr. Harrold testified at trial that Adams would have to write a letter stating that he was fit and able to perform his duties. Adams then introduced the October 22 letter, in which Adams stated, "I . . . presently am fit and capable of performing my duties as I was on the day you removed me from service." This letter, like the earlier letter, directly addressed the issue of Adams' physical condition, and the railroad's position on this issue. Mr. Harrold stated at trial that, despite the October 22 letter, the railroad had not lifted its medical disqualification. The testimony, in conjunction with the letter, served to clarify the parties' positions on a central issue in the case, namely the effect of Adams' injury on his physical

condition. The October 22 letter, then, was directly relevant.

At the time Adams' letter of October 22 was introduced, the railroad attempted to introduce a letter which terminated Adams for picket line misconduct. This letter was excluded because it had no relevance to Adams' physical condition. In contrast to his removal from service, Adams' termination was not for medical reasons.

The railroad contends that, by virtue of these evidentiary rulings, the jury was left with the mistaken impression that Adams' medical condition prevented him from returning to work with the railroad. The short answer to that argument is that the letters which were admitted, together with the testimony of Mr. Harrold and Adams, established that (1) Adams was injured while on the job, (2) the defendant removed Adams from service on the grounds that he was medically disqualified to perform his duties, (3) Adams sought reinstatement but the defendant refused to lift the medical disqualification and continued that refusal at trial. Only evidence as to Adams' medical disqualification was admitted into evidence. The objected to letters were relevant to that issue. The excluded letter related to Adams' picket line activity. It was irrelevant and, therefore, was excluded. These rulings were proper and do not justify a new trial.

B. The Size of the Jury Award.

The First Circuit has recently reiterated that a jury's award in a tort case should not be set aside unless it is "grossly excessive" or "shocking to the conscience." Kolb v. Goldring, Inc., 694 F.2d 869, 871 (1st Cir. 1982). In describing the particular deference due to jury awards in tort cases, Kolb pointed out that damages in such cases "are given to compensate for losses not susceptible of arithmetical calculation, such as pain and grief." Id.

The jury had before it evidence as to damages for (1) lost back wages from the time Adams was removed from service for medical reasons in August 1980 to the time of trial, (2) impaired earning capacity, and (3) pain and suffering.[2] The railroad argues that Adams is not entitled to compensation for lost wages or impaired earning capacity because he testified that he considers himself fit and capable of performing his duties with the railroad. Moreover, continues the railroad, "[t]here was no medical testimony presented that Adams has been or will hereafter be medically disqualified from any occupa-

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[2] The parties do not dispute that Adams was paid full wages for time lost from the date of his injury until his return in November, 1977. In addition, the railroad paid his medical expenses for treatment of his injury during this time.

tion on account of his injury." Defendant's Memorandum of March 21, 1983, at p. 8. The railroad's assertions ignore the fact that its own President, Orville Harrold, testified that Adams has been and continues to be medically disqualified from employment with the railroad. The jury was certainly entitled to credit that critical testimony and use it in determining its damage award.

The respective positions of the parties are admittedly a bit bizarre — the plaintiff claiming he is fit, and the defendant asserting that he is not. Nonetheless, there was evidence by which a jury could find that Adams had been medically disqualified from his occupation as a result of his accident. If the railroad chooses to impose a continuing medical disqualification on the plaintiff, it should not be surprised that a jury accepts that determination of continuing disability. Clearly, the jury's decision to do so was a finding of fact supported by competent and relevant evidence.

Adams testified that when he was removed from service in August, 1980, he was earning an annual salary of approximately $32,000 a year. Assuming no increases in pay, Adams would have earned about $72,000 from August, 1980 to the time of trial, had he not been removed. During this period Adams stated that he attempted to find jobs, but was only able to earn a total of $4,200. Thus, the jury could have reasonably found lost back wages of $67,800.

As for impaired future earning capacity, Adams testified that he had gone to work for the railroad directly from high school, and had no other training or education. At the time he was injured he was only twenty years old. If Adams is medically disqualified from his occupation as a trainman, the jury could reasonably conclude that the impairment to his earning capacity over the course of his lifetime would be very substantial. Adams stated that he had sought employment from many employers, and had only earned $4,200 from August, 1980 to December, 1982. He was able to find part-time work from a construction company at the rate of $5.00 an hour. The differential between this rate of pay, and Adams' salary as a trainman is over $20,000 a year. Given his age, the jury would have been warranted in finding that he had a work expectancy of at least thirty years.

Finally, Adams testified as to the pain and suffering he experienced through the accident causing his injury and the subsequent operations on his finger. He also gave evidence regarding the continuing embarrassment resulting from his permanent disfigurement. The jury, of course, was entitled to give Adams an award to compensate him for this pain and suffering.

The jury award in this case may have been generous, but it was not shockingly so. Given the deference to

which the jury's decision is entitled, the court finds that the size of the award in this case does not warrant a new trial.

C. Evidence of Adams' Negligence

The railroad claims that there was no evidence that anything other than Adams' own negligence caused his injury. It is undisputed that there was evidence of Adams' negligence. Indeed, the jury found him 20% contributorily negligent. There was also testimony, however, on which the jury could reasonably assess liability against the railroad. Adams testified that the couplers on the railroad cars would not couple automatically. The SAA, 45 U.S.C. §2, specifically requires railroads to equip their cars "with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The jury reasonably determined that the railroad had violated the SAA. Moreover, there is no question that had the couplers coupled automatically, Adams' injury would not have occurred. Once such a violation and causation is shown, the question of contributory negligence is irrelevant. 45 U.S.C. §53.

The railroad contends that Adams acknowledged that the couplers were not defective. This contention is incorrect. Adams simply said that standard practice is

that a coupler is not reported defective until all avenues of coupling, including hand coupling, are attempted. See Transcript, p. 90. If this is, in fact, the railroad's practice, then it cuts against the railroad not against Adams. The language of the SAA makes clear the statute's intent to avoid the necessity of having men go between the cars to couple and uncouple them.

There was also evidence from which the jury could have concluded that an employee of the railroad, brakeman Talbot, had not properly secured free standing cars with chocks and handbrakes, and that this caused Adams' injury. See Transcript, pp. 19-20, 89. From this the jury could conclude that the railroad had been negligent, and had failed to provide Adams with a safe workplace.

III. Motion for Relief From Judgment

The railroad objects to the inclusion of prejudgment interest in the award to Adams, on the grounds (1) that prejudgment interest is not authorized in FELA or federal tort cases, and (2) that the question of prejudgment interest was not presented to the jury. Adams does not respond to these substantive contentions, but argues that the railroad's motion to strike prejudgment interest is untimely. Adams states that the motion to strike prejudgment interest is, in essence, a motion to amend or

alter the judgment as authorized by Rule 59 of the Fed. R. Civ. P.

Under Rule 59(e), a motion to alter or amend must be brought within ten days of the entry of judgment. Judgment was entered in this case on December 17, 1982. While the railroad brought a Rule 59 motion for a new trial within ten days, it did not seek to delete prejudgment interest until February 25, 1983. Recognizing that it could no longer bring a Rule 59(e) motion, the railroad characterized its motion to strike prejudgment interest as a motion under Rule 60(b)(6).

Rule 60(b)(6) provides that the court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." A motion under this Rule need only be brought "within a reasonable time." The defendant argues that it was an error of law to add prejudgment interest to the jury's verdict, and that this error justifies relief from the operation of the judgment, under Rule 60(b)(6). The First Circuit, however, has taken a narrower reading of the power of the court to use Rule 60(b)(6) to strike an award of prejudgment interest. In Scola v. Boat Frances, R., Inc., 618 F.2d 147 (1st Cir. 1980), the court ruled that a motion to strike an award of prejudgment interest in a Jones Act case should properly be brought under Rule 59(e), within ten days of the entry of judgment. The court stated:

> The ten day time limitation fixed by Rule 59(e) is one of the few limitary periods which the court has no power to enlarge, Rule 6(b), and the use of Rule 60(b) as an escape from it introduces an unacceptable contradiction to an important principle underlying the finality of judgments. The somewhat contrary view of Rule 60(b)(1) expressed in 7 J. Moore Federal Practice §60.22[3] (2d ed. 1979) continues to be an unsatisfactory analysis of this part of the rule. It fails to give effect to the circumstance that "Rule 59 in particular is based on an 'interest in speedy disposition and finality.'"

Id. at 154 (citations omitted). On the basis of this view of the interaction between Rules 59(e) and 60(b), the court reversed the district court's order striking the award of prejudgment interest under Rule 60(b)(6).

While the defendant's delay in filing a Rule 60(b) motion in Scola was greater than defendant's delay in the present case, the principles of Scola are applicable here. The alleged error of law in awarding prejudgment interest was obvious on the face of the judgment, and there is no apparent reason why the defendant could not have challenged it in a Rule 59(e) motion. As in Scola, the defendant here should not be allowed to circumvent the requirements of Rule 59(e) by filing a motion under Rule 60(b). The defendant's motion to strike the award of prejudment interest, therefore, is denied.[3]

An order will issue.

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[3] Because of the court's resolution of this issue, the question of whether the award of prejudgment interest was an error of law need not be decided.

FIRST CIRCUIT OPINION

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 83-1398

MICHAEL ADAMS,
Plaintiff, Appellant,

v.

PROVIDENCE AND WORCESTER COMPANY,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Bownes and Breyer, Circuit Judges,
and Smith*, Senior District Judge.

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* Of the District of Montana, sitting by designation.

William J. LeDoux, with whom James E. Wallace, Jr., P.C., John A. Mavricos, and Bowditch & Dewey were on brief, for appellant.

George J. Cahill, Jr., with whom Cahill & Goetsch, P.C. was on brief, for appellee.

November 23, 1983

Per Curiam. Defendant appeals from a judgment which followed a $625,000 jury verdict for plaintiff in this case arising under the Federal Employers Liability Act (FELA) (45 U.C.S. §51 - 60) and the Safety Appliance Act (45 U.S.C. §1 - 43).

Plaintiff, a trainman who on alternate days performed the duties of an engineer, conductor, and brakeman, was injured on August 16, 1977, when the little finger of his right hand was crushed in a coupling operation. [1]

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[1] We do not here consider the sufficiency of the evidence to sustain the jury's findings on the liability issues since the defendant made no motion for a directed verdict. See Valm v. Hercules Fish Products, Inc., 701 F.2d 235 (1st Cir. 1983); Sears v. Pauly, 261 F.2d 304, 307 (1st Cir. 1958).

After two operations, the plaintiff was left with about half of a little finger. Plaintiff returned to work on November 2, 1977, and worked with full pay until August 29, 1980, at which time he was removed from train service.

On plaintiff's direct examination, he testified that he worked as an engineer during the period November 2, 1977, to mid-December 1977. From then until termination he worked full duty "without problems" as an engineer, conductor, and brakeman. Following his termination, he was variously employed in jobs requiring the use of his hands, and at the trial he testified that he was medically fit to work in his occupation as a trainman. This was all confirmed on cross-examination.[2]

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[2] On cross-examination plaintiff testified as follows:

Q. Mr. Adams, after you returned to work on November 2nd, 1977, is it fair to say that up to the filing of the lawsuit here you did not receive any further medical attention on account of your injury?

A. I believe that's true, yes.

Q. I believe your earliest testimony was that as of, at least, 1978, the beginning of '78, you considered yourself fully able to carry out your old job?

A. Yes.

Q. And, in fact, did so up until at least August of '80?

(CONT.)

Counsel for plaintiff argued to the jury that "Michael wants to return and he is in [sic] the opinion he can do the work."

There was no medical evidence offered as to the future, and there was no evidence as to the manner in which the loss of about half of his little finger would affect plaintiff's capacity to work.

Plaintiff does not argue that he is disabled; rather he argues that there is evidence from which a jury might have found that he was disabled. That argument is founded on a letter (received as Exhibit 1) written by Orville Harrold, the general manager of the defendant corporation, which stated:

> Dear Mr. Adams:
>
> It has come to my attention today, through your attorney, that because of an injury suffered by you on August 16, 1977 that, "As a result plaintiff was made sick, sore and lame and has suffered great pain of body, anguish of mind, and will so continue

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[2] (CONT).

A. Yes, I did.
Q. And you still consider yourself able to do so?
A. Yes.
Q. And there was no period of time in 1980 when you considered that you were unable to do so?
A. No.

> to suffer for an indeterminate period of time in the future; that prior to said accident the plaintiff was a strong able-bodied man capable of earning and actually earning the wages of a Trainman as an employee of the defendant Corporation; that as a result of said accident, the plaintiff had been incapacitated and prevented from engaging in his employment and that the plaintiff will continue to be so incapacitated in the future.[3]
>
> In view of the above representation of your physical and mental condition, that you have made through your attorney, and the fact that your physical and mental condition is responsible for the safety of private citizens and fellow-employees, I find it necessary to remove you from train-service immediately.

Plaintiff claims that this letter was an admission by defendant that plaintiff was disabled. This, however, is not what it shows. Plaintiff, by his statements, was able to work and was working until the defendant received a copy of the complaint. The fact is, and the letter accurately reveals the fact, that the plaintiff was discharged because of the allegations in the complaint. The letter clearly says that, in view of the representations, plaintiff's removal from train service was neces-

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[3] With very minor deviations, the quoted language is taken accurately from the complaint.

sary. It does not say that the act of termination resulted from plaintiff's disability. A railroad employee who represents to the railroad that he is incapacitated makes the railroad extraordinarily vulnerable in actions involving that employee brought by fellow employees or third persons against the railroad. The management of a railroad might very well believe that the statement of incapacity was in itself a sufficient reason for discharge. Whether that is true as a matter of law is another question.[4] In any event, the letter cannot be read to state more than that the employer did not want a man who represented himself to be incapacitated on its payroll. Hence we conclude that the relevance of the letter to the issues in the case was highly limited. Indeed, we have doubts as to its admissibility under Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."), as supplemented by Fed. R. Evid. 401 ("Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

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[4] We here deal with the damages flowing from an injury compensable under FELA. This is not an action for wrongful discharge. Some other tribunal will decide whether plaintiff's discharge, brought about by the false statements in the complaint, was wrongful.

Regardless, Fed. R. Evid. 403 provides that even relevant evidence may be excluded if its probative value is substantially outweighed by the confusion and prejudice it might engender. And, although appellate courts do not often second-guess trial courts in balancing relevance against prejudice, see, e.g., United States v. Boykin, 679 F.2d 1240, 1244 (9th Cir. 1982); United States v. Barletta, 652 F.2d 218, 220 (1st Cir. 1981), in this case we are willing to do so. See Ballau v. Henri Studios, Inc., 656 F.2d 1147, 1154 (5th Cir. 1981); see also 22 C. Wright & K. Graham, Federal Practice and Procedure §5223, at 317 (1978).

Were we playing games, perhaps a plaintiff could claim some kind of a one-upmanship if he made a false statement and the defendant affirmed it. But we believe the law is designed to discover the truth, and the demonstratable truth in this case is that plaintiff was not incapacitated between November 2, 1977, the date that he returned to work, and August 29, 1980, the date that he was discharged. He worked and was paid in full for that period. Neither was he incapacitated between August 29, 1980, and the date of trial. There was no medical change in his condition after August 29, 1980, and in the absence of some change, he could do the work he had previously done. He claimed throughout the trial that he had not been disabled and that he was not then

disabled. In terms of whether plaintiff had any future loss of earnings, the letter had no probative value.

The admission of Exhibit 1 clearly caused confusion and resulted in prejudice. Plaintiff did not argue that his physical capacity to earn had been injured; rather he argued that he was able to work but had been "medically discharged." The jury verdict in the amount of $625,000 must be attributed in a large measure to loss of future earnings based on the medical discharge.

The judgment must be reversed because of the admission of Exhibit 1.

When this trial was concluded, plaintiff, as a matter of law, had no claim for loss of earnings before the date of his dismissal because he had been paid in full. He had no claim for medical bills because they had been paid in full. He did have a claim for loss of earnings after August 29, 1980, only if he proved some diminution of earning capacity after the date of termination. There was no such proof. Unresolved is plaintiff's claim for damages for physical pain and mental anguish.

In view of what the plaintiff both contended and proved at the trial, he is not entitled to damages for loss of future earnings because his future earning power was not impaired. The judgment of the trial court is

Reversed. The case is remanded for trial on the issue of only those damages arising out of plaintiff's physical pain and mental anguish.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1398

MICHAEL ADAMS,
Plaintiff, Appellant,

v.

PROVIDENCE & WORCESTER COMPANY,
Defendant, Appellee.

JUDGMENT

Entered: November 23, 1983

This cause came on to be heard on appeal from the United States District Court for the District of Massachuseetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part, vacated in part and the cause is remanded to that court for further proceedings consistent with the opinion filed this day. No costs.

By the Court:

Francis P. Scigliano
Clerk.

ORDER ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1398

MICHAEL ADAMS,
Plaintiff, Appellee,

v.

PROVIDENCE & WORCESTER COMPANY,
Defendant, Appellant.

ORDER OF COURT

Entered: December 19, 1983

Upon consideration of appellee's "Petition for Rehearing",

It is ordered that said petition for rehearing be, and the same hereby is, denied.

By the Court:

Francis P. Scigliano
Clerk.

Plaintiff's Exhibit No. 1

August 28, 1980

Mr. Michael P. Adams
RFD-1
Quaker Highway
Uxbridge, Massachusetts 01569

Dear Mr. Adams:

It has come to my attention today, through your attorney, that because of an injury suffered by you on August 16, 1977 that, "As a result plaintiff was made sick, sore and lame and has suffered great pain of body, anguish of mind, and will so continue to suffer for an indeterminate period of time in the future; that prior to said accident the plaintiff was a strong able-bodied man capable of earning and actually earning the wages of a Trainman as an employee of the defendant Corporation; that as a result of said accident, the plaintiff had been incapacitated and prevented from engaging in his employment and that the plaintiff will continue to be so incapacitated in the future;"

In view of the above representation of your physical and mental condition, that you have made through your attorney, and the fact that your physical and mental condition is responsible for the safety of private citizens and fellow employees, I find it necessary to remove you from train service immediately.

Yours truly,

Orville R. Harrold
General Manager
Post Office Box 1188
Worcester, Mass. 01601

Plaintiff's Exhibit No. 2

October 22, 1982

Orville Harrold, President
Providence & Worcester Railroad Company
P.O. Box 1188
Worcester, Massachusetts 01601

Re: Michael Adams vs. Providence & Worcester Co.
No. CA 80-2537-T

Dear Mr. Harrold:

Enclosed please find a copy of pages 10-12 from your sworn testimony at a Deposition in Boston on June 18, 1982. My attorney has provided me with a copy of those pages to comply with your directives as to how I may return to work despite my lawsuit for the personal injury I sustained.

You testified that all I have to do is write you a letter stating that I am now capable of performing my duties as trainman because I have no "mental anguish and all the things" described in my complaint that prevented me from performing my duties. Don't you recall that I was performing my duties at the time you removed me from service?

From the day you removed me from service to the present, you have not had the decency to tell me how simple it would be fore my return to employment. For over two years now, I have been out of work because you decided I was not physically and mentally fit to perform my job. I protested my removal from service to you personally on the same day you removed me from service. In addition, my union representative wrote to Vice President Allan Kaulbach on December 22, 1980, demanding that I be returned to active service unless an

examination by a doctor disclosed an actual physical defect warranting a conclusion I have not recovered from my accident (see enclosed copy of that letter).

I am hereby complying with the directive set forth in your recent deposition, and state that I, Michael Adams, presently am fit and capable of performing my duties as I was on the day you removed me from service. Since I have been prevented from engaging in my employment because you determined I was physically and mentally unfit to perform my duty as a result of my injury, my attorney is claiming damages for the lost earnings during that time.

Very truly yours,

Michael Adams

cc: Hon. Joseph L. Tauro, U.S.D.J.
Joseph F. Ryan, Esq.

Office - Supreme Court, U.S.
FILED
APR 19 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1556

In The
Supreme Court of the United States
October Term, 1983

MICHAEL ADAMS,

Petitioner,

vs.

PROVIDENCE & WORCESTER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT, PROVIDENCE & WORCESTER COMPANY, IN OPPOSITION

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QUESTIONS PRESENTED

At the outset respondent respectfully suggests that the questions presented for review, as characterized by either petitioner or respondent, are not of the "special and important" character which warrant the grant of review by this Court, presenting neither a decision by the Court of Appeals in conflict with the decisions of other courts of appeal or of this Court, nor a departure by the Court of Appeals from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision, nor an important question of federal law which should be settled by this Court.

Respondent respectfully submits that this case presents the following questions:

1. Did the Court of Appeals have the power to review the District Court's ruling on the admissibility of certain evidence?
2. Did the Court of Appeals have the power to remand the case for a new trial limited to the issue of damages for physical pain and mental anguish only?

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No. 83-1556

In The
Supreme Court of the United States
October Term, 1983

MICHAEL ADAMS,

Petitioner,

vs.

PROVIDENCE & WORCESTER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT, PROVIDENCE & WORCESTER COMPANY, IN OPPOSITION

STATEMENT OF THE CASE

With the exception of the following modifications, respondent is satisfied with petitioner's statement of the case for purposes of this Court's consideration of the questions presented for review.

Respondent has never accepted, and does not accept here, petitioner's characterization of his removal from service on August 28, 1980 as a "medical disqualification."

Indeed, petitioner's characterization assumes the existence of the very issue decided against him by the Court of Appeals, namely, that the letter removing petitioner from service (reproduced at page 25a of the Petition; also at page 5, *infra*) constituted neither an admission nor any other probative evidence of any physical disability. (*Adams v. Providence and Worcester Company*, 721 F.2d 870, 872 (1st Cir. 1983); Petition, 18a-19a, 21a.)

Further, petitioner fails to point out that respondent's Fed. R. Civ. P. 59 motion for new trial specifically claimed that the jury verdict was excessive because there was no evidence of impaired future earning capacity. (*Adams v. Providence & Worcester Company*, 564 F.Supp. 1373, 1375 (D. Mass. 1983); Petition, 4a, 7a.) The issue, therefore, was directly before the District Court which had the opportunity to consider all of the evidence in the case, including the so-called "seven distinct items of evidence" referred to at pages 27-29 of the Petition. Petitioner did not refer to these "items of evidence" either in opposing respondent's motion for new trial, in his brief to the Court of Appeals or in his petition for rehearing to the Court of Appeals. Petitioner's first reference to these items of evidence comes in the instant petition. In any event, as will be discussed *infra*, these items of evidence are no more probative of impaired earning capacity than was the so-called letter of "medical disqualification."

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Properly Exercised Its Appellate Authority in Reversing the Evidentiary Ruling of the District Court.

Petitioner here claims that the Court of Appeals "exceeded the bounds of proper appellate review" (Petition,

12) in reversing the District Court's ruling that the "removal from service" letter was admissible in evidence. Petitioner cites no pertinent legal authority for this contention, the reason for which omission is clear: appellate courts are clearly empowered to correct abuses of discretion by trial courts with regard to evidentiary rulings. *See, e.g., Bowden v. McKenna,* 600 F.2d 282, 283 (1st Cir. 1979), cert. denied, 444 U.S. 899 (1979); *United States v. Harvey,* 547 F.2d 720, 723-724 (2d Cir. 1976); *Utility Control Corporation v. Prince William Construction Co., Inc.,* 558 F.2d 716, 721 (4th Cir. 1977); *Ballou v. Henri Studios, Inc.,* 656 F.2d 1147, 1155-1156 (5th Cir. 1981); *Charter v. Chleborad,* 551 F.2d 246, 249 (8th Cir. 1977), cert. denied, 434 U.S. 856 (1977); *United States v. Aims Back,* 588 F.2d 1283, 1286-1287 (9th Cir. 1979); *United States v. Dothard,* 666 F.2d 498, 504-505 (11th Cir. 1982).

The result of an appellate court's decision that the admission of evidence was reversible error is to exclude such evidence from being admitted at a new trial. *See, e.g., United States v. Dothard,* 666 F.2d 498, 505 (11th Cir. 1982).

There is nothing novel or important about this issue, and in the case at bar the First Circuit simply concluded that a certain piece of evidence should have been excluded by the trial judge because it had little, if any, probative value and because whatever probative value it may have had was outweighed by the fact that it "clearly caused confusion and resulted in prejudice." (721 F.2d at 872; Petition, 21a.) It can scarcely be said that the Court of Appeals' action constituted a "departure from the accepted and usual course of judicial proceedings" (Supreme Court Rule 17.1(a)), and, while respondent submits

that a petition for certiorari is not an appropriate occasion for an analysis of the facts of a case,[1] an analysis of the pertinent facts in the present case demonstrates that the First Circuit's action was entirely proper and, indeed, that its decision was right.

A. The Letter Was Not Relevant.

At trial, petitioner testified without contradiction that he was injured in the course of employment and that he subsequently was able to, and did, for a period of nearly three years until the time he was removed from service, perform precisely the same job he had performed before the accident. Respondent did not dispute that petitioner was removed from service because of the assertion in his complaint, seeking damages under the Federal Employers Liability Act (FELA) and the Safety Appliance Act (SAA), that:

> As a result of the said accident, the plaintiff was made sick, sore and lame and has suffered great pain of body, anguish of mind and will so continue to suffer for an indeterminate period of time in the future; that prior to said accident, the plaintiff was a strong able-bodied man capable of earning and actually earning the wages of a trainman as an employee of the defendant corporation; that as a result of the said accident, the plaintiff had been incapacitated and prevented from engaging in his employment, and that the plaintiff will continue to be so incapacitated in the future . . .

---

[1] "Granting of the writ [of certiorari] would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corporation v. Western Electric Company, Inc.*, 304 U.S. 175, 178 (1938). *See, e.g., N.L.R.B. v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502-503 (1951).

Respondent further did not dispute that, upon its receipt of the complaint, its general manager removed petitioner from service. Respondent did, however, object to the admission in evidence of a letter from its general manager notifying petitioner that he had been removed from service. (Trial Transcript, December 16, 1982, p. 1-34.) The letter, dated August 28, 1980, read as follows:

> Dear Mr. Adams:
>
> It has come to my attention today, through your attorney, that because of an injury suffered by you on August 16, 1977 that, 'As a result plaintiff was made sick, sore and lame and has suffered great pain of body, anguish of mind, and will so continue to suffer for an indeterminate period of time in the future; that prior to said accident the plaintiff was a strong able-bodied man capable of earning and actually earning the wages of a Trainman as an employee of the defendant Corporation; that as a result of said accident, the plaintiff had been incapacitated and prevented from engaging in his employment and that the plaintiff will continue to be so incapacitated in the future.'
>
> In view of the above representation of your physical and mental condition, that you have made through your attorney, and the fact that your physical and mental condition is responsible for the safety of priviate citizens and fellow-employees, I find it necessary to remove you from train service immediately.

The Court of Appeals held that it was reversible error to admit the August 28, 1980 letter into evidence. (721 F.2d at 873; Petition, 21a.) Contrary to petitioner's contention, the court ruled that the letter was not an admission by respondent that petitioner was disabled. (721 F.2d at 872; Petition, 18a.) Instead, the court ruled that "the letter cannot be read to state more than that the employer

did not want a man who represented himself to be incapacitated on its payroll." (721 F.2d at 872; Petition, 19a.)[2] The court rightly concluded that in light of petitioner's own testimony as to his ability to perform his work and his willingness to do so, respondent's mere recitation of petitioner's "false" allegations in his complaint was not probative of petitioner's "disability" — indeed, was not probative of anything other than the fact that petitioner "was discharged because of the allegations in the complaint" (721 F.2d at 872; Petition, 18a), a matter which the court found was highly prejudicial to respondent.[3]

B. The Prejudicial Effect of the Letter Outweighed Any Probative Value.

The Court of Appeals concluded that "the admission of [the letter] clearly caused confusion and resulted in prejudice" (721 F.2d at 872; Petition, 21a), substantially outweighing any probative value it might have had. The court noted petitioner's own testimony that he was not incapacitated at any time from November 2, 1977, when he returned to work, up to and throughout the trial, that

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[2] The court also noted that "A railroad employee who represents to the railroad that he is incapacitated makes the railroad extraordinarily vulnerable in actions involving that employee brought by fellow employees or third persons against the railroad." (*Id.*) As this Court has stated, "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service." *Minneapolis, St. P. & S. Ste. M.R. Co. v. Rock*, 279 U.S. 410, 413-414 (1929).

[3] The court noted that this was not an action for wrongful discharge and that the effect of petitioner's "discharge, brought about by the false statements in the complaint," would be decided in some other forum. (721 F.2d at 872; Petition, 19a).

throughout that period and at trial he considered himself "fully able to carry out [his] old job." (721 F.2d at 871-872; Petition, 16a-17a, 20a.)

Further, the court heard petitioner's own argument on appeal that the jury could have allocated $510,000 of the $625,000 verdict to impairment of earning capacity, leaving approximately $67,800 for "past wage loss" and $47,200 for "pain and suffering and mental anguish." (Petitioner's Brief on Appeal, 22.) Given the obvious and absurd paradox in an award of more than $500,000 for impaired earning capacity to an individual who both resumed his full duties for nearly three years after his injury and testified to the jury that he was perfectly fit to continue working as a trainman, the court was compelled to the conclusion that the letter "clearly caused confusion and resulted in prejudice."[4]

Respondent is not unaware, as the First Circuit acknowledged, that "appellate courts do not often second-guess trial courts in balancing relevance against prejudice." (721 F.2d at 872; Petition, 20a.) But appellate courts, in a very real sense, are the courts of last resort to guard against the very kind of prejudice which was

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[4] The prejudicial effect of the admission of the letter is clear in that it allowed the jury to infer that respondent sought to punish petitioner for merely seeking to enforce his rights under the FELA or that it was simply unfair that his employment had been terminated. Indeed, counsel for petitioner argued to the jury that petitioner "is being prevented from work as a result of this medical disqualification [by respondent]" and that if respondent "wants to medically disqualify Michael Adams as a trainman at the Providence and Worcester Railroad because of that finger in 1977 [it] has to pay compensation to Michael Adams for damaging his earning capacity." (Trial Transcript December 17, 1982, p. 2-31).

worked in this case. And while the infrequency of having to perform its safeguarding role is a credit to the district courts, the courts of appeal exist to perform that role when necessary. As the Fifth Circuit put it, in commenting on the proposition that a trial court has discretion to admit or exclude evidence, "While we of course agree with this statement as a general proposition, it is equally plain that this discretion is far from unlimited and that appellate courts have a vital role to play in overseeing the exercise of this discretion." *United States v. Robinson*, 544 F.2d 611, 616 n.6 (5th Cir. 1976), cert. denied, 435 U.S. 905 (1978).

II. The Court of Appeals Appropriately Remanded the Case for a New Trial on the Issue of Damages for Physical Pain and Mental Anguish Only.

Petitioner claims that the Court of Appeals committed error and ruled in conflict with the opinions of this Court and other courts of appeal in remanding the case for a new trial on a limited damages issue. (Petition, 21.) Respondent respectfully submits that the decision of the First Circuit was not only not in conflict with this Court or any other circuit, but was a judicious exercise of its appellate power.

Petitioner's argument is based entirely on the premise that the Court of Appeals directed judgment for respondent in a situation where respondent had not filed motions for directed verdict or judgment notwithstanding the verdict under Fed. R. Civ. P. 50. As will be demonstrated, the premise itself rests upon a misapprehension by petitioner as to what the Court of Appeals did.

The Court of Appeals did not direct the entry of judgment for respondent. On the contrary, it is clear

that the court affirmed the judgment of the District Court in favor of petitioner on all issues of liability.[5] As to damages, the court simply remanded the case for a new trial because the verdict was excessive and not supported by the evidence. While the court did rule as a matter of law that the petitioner was not entitled to recover on one element of damages alleged to have been suffered, it is incorrect to say that the Court of Appeals directed a judgment on the issue of loss of earning capacity since judgments can only be directed on issues of liability, not damage. All the court did was rule that on the basis of the evidence, primarily petitioner's own testimony, he is not entitled to damages for loss of earning capacity. The court's actions were neither unusual nor improper. Indeed, in virtually every case where appellant claims the damage award is grossly excessive, the appellate court must consider and decide what damages plaintiff is entitled to, just as it did in this case.

Petitioner's reliance on *Cone v. West Virginia Pulp and Paper Company*, 330 U.S. 212 (1947), *Globe Liquor Company v. San Roman*, 332 U.S. 571 (1948), *Johnson v. New York N. H. & H. R. Co.*, 344 U.S. 48 (1952) and *Iacurci v. Lummus Company*, 387 U.S. 86 (1967) is misplaced, and his strenuous efforts to fit the present case into the mold to which those cases apply are unavailing. As this Court has stated, the opinions in *Cone*, *Globe* and *Johnson* "make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed

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[5] Footnote one to the court's opinion states: "We do not here consider the sufficiency of the evidence to sustain the jury's findings on the liability issues since the defendant made no motion for a directed verdict." [citations omitted] (721 F.2d at 871; Petition, 15a).

strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved." *Neely v. Eby Construction Co.*, 386 U.S. 317, 325 (1967). This language alone distinguishes the present case from those cases. In the first place, the First Circuit did not order the entry of judgment for the verdict loser, respondent; it affirmed the judgment on liability in favor of the petitioner. Indeed, in that regard its decision was completely in harmony with *Cone*. Second, respondent's decision not to move under Rule 50 has no bearing on the appellate court's power to review the excessiveness of the verdict.

As has been pointed out, respondent could not have moved for a directed verdict solely on the extent of damages. Nor was respondent bound to file motions for directed verdict or judgment n.o.v. if it chose only to contest the size of the verdict. Respondent took the only action it needed to take, or even could have taken, to preserve its right to appellate review of the issue of excessiveness of the verdict — it moved for a new trial pursuant to Fed. R. Civ. P. 59.[6]

In fact, courts of appeal have remanded cases on the basis of the excessiveness of the jury's award where liability has been conceded, thereby eliminating any possibility of a directed verdict. *See, e.g., Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 780 n.1, 786 (5th Cir. 1983); *Carlton v. H. C. Price Co.*, 640 F.2d 573, 577, 584 (5th Cir. 1981); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982); *Arnold v. Eastern Air Lines, Inc.*, 712 F.

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[6] See, Wright & Miller, *Federal Practice & Procedure*, §2540 at 611.

2d 899, 901, 906 n.12 (4th Cir. 1983), cert. denied, — U.S. —, 79 L.Ed.2d 168, 104 S.Ct. 703 (1984).

The statutory grant of appellate jurisdiction to the courts of appeal, found at 28 U.S.C. § 2106, is broad indeed:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Petitioner does not appear to dispute that an appellate court has jurisdiction to rule on a claim that a jury's verdict is excessive or that it has the power to set aside a verdict that it finds excessive. Indeed, it is clear that a court of appeals is empowered to reduce a damage award when, as a matter of law, the plaintiff is not entitled to an element of that award. *See, e.g., Overton v. United States*, 619 F.2d 1299, 1309 (8th Cir. 1980). Nor does petitioner dispute that an appellate court has both the jurisdiction and the power to consider whether a trial court has abused its discretion in admitting or excluding evidence.

Yet that is all the Court of Appeals for the First Circuit did in the present case: it ruled that the trial court erred in admitting certain evidence and that that error resulted in an excessive verdict; it preserved the essential judgment in petitioner's favor and remanded the case for a new trial on damages in light of the evidence presented to the jury and to the trial court, evidence which the petitioner unswervingly reargued to the trial

court in opposing respondent's motion for a new trial and to the Court of Appeals in his brief as appellee and in his petition for rehearing.

III. There Was No Evidence to Support Petitioner's Claim for Loss of Earning Capacity.

The Court of Appeals, having the complete trial record before it, ruled that the petitioner was not entitled to damages for loss of earning capacity because "there was no such proof." (721 F.2d at 873; Petition, 21a.) Its ruling was founded on the predicates of the petitioner's own case: his testimony that "he could do the work he previously had done" (721 F.2d at 872; Petition, 20a), his actual performance of those duties for nearly three years after the accident, his testimony at trial that he still considered himself able to do so and his counsel's argument to the jury that the petitioner "wants to return [to his former job] and he is in [sic] the opinion he can do the work." (721 F.2d at 871; Petition, 17a.) Even petitioner concedes that "an appellate court may reverse a jury decision . . . if there is *no* evidence whatsoever in the record supporting the jury's decision. . . ." (Petition, 26).

Nevertheless, petitioner now raises seven "distinct items of evidence" which he claims the Court of Appeals "ignored" (Petition, 27-29):

> *"1. A description of the precise character of pre-injury and post-injury job tasks."*

This item constitutes the most compelling reason why petitioner is not entitled to damages for loss of earning capacity. By his own admission, petitioner was fully fit and able after the accident to perform the same job tasks he performed before the accident. The Court of Appeals

clearly considered this evidence. (721 F.2d at 872; Petition, 16a-17a).

"*2. The display of the lost digit to the jury.*"

This evidence is not relevant to loss of earning capacity, but rather to those damages the petitioner may yet recover for physical pain and mental anguish at the new trial.

"*3. The display of the digit in action in a manual task.*"

Assuming petitioner's description of his difficulty in drawing on a chalkboard with his injured finger is accurate, there being no reference to it in the trial record, it bears no relevance to petitioner's ability to perform the work of a trainman, which skills petitioner was in fact able to perform.

"*4. A documentary hospital report [dated 8/29/77] indicating a recommendation that the petitioner undergo physical therapy.*"

This evidence reveals nothing about petitioner's earning capacity as of December 16, 1982, the time of trial.

"*5. A documentary hospital report [dated 8/29/77] indicating the risk of future amputation of the digit.*"

At most, such evidence may relate to damages for physical pain and mental anguish which petitioner may yet recover at the new trial.

"*6. A documentary hospital report [dated 10/4/77] indicating the diminshed sensation of the injured digit.*"

In light of the evidence of petitioner's ability to fully function for nearly three years after the accident as a

trainman and his continuing fitness at trial, any loss of future earning capacity resulting from such earlier "diminished sensation" would be purely speculative. Such evidence may be considered at the new trial on damages for physical pain and mental anguish.

> *"7. A documentary hospital report [dated 10/4/77] indicating tenderness in the tip of the mutilated digit."*

Such evidence relates solely to petitioner's claim for damages for physical pain and mental anguish.

The Court of Appeals recognized that petitioner's claim for damages for physical pain and mental anguish was "unresolved" and properly remanded the case for a new trial on that element of damages. If any of the "distinct items of evidence" are probative at all, they are probative of that issue, and petitioner is free to offer such evidence at the new trial.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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83 - 1556

No.

Office - Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1983

MICHAEL ADAMS,

Petitioner,

vs.

PROVIDENCE & WORCESTER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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Respondent.

REPLY BRIEF

In its Brief In Opposition, the respondent Providence & Worcester Company states that it "has never accepted, and does not accept here, petitioner's characterization of his removal from service on August 28, 1980 as a 'medical disqualification'." (Respondent Br. at 1).

The petitioner underscores that throughout the trial the respondent never took exception to the use of the term "medical disqualification." And in fact, both Judge Tauro and the petitioner's counsel asked the respondent's chief witness, President Harrold, about the medical disqualification:

THE COURT: The specific question to you is: What if anything would the Plaintiff have to do in order to have his medical disqualification lifted by you?

THE WITNESS: Okay. I'm sorry. He would have to tell me that he was fit and able to perform his duties. (Trs. 100).

. . .

Q. Sir, today have you lifted the medical restriction, medical disqualification of Michael Adams?

A. No. (Trs. 101)

See also Transcript at 83-84; 104-05. This direct examination testimony was never disputed by the respondent during the trial, and Judge Tauro, relying on this undisputed testimony, proceeded to base his ruling on the fact that the petitioner had been medically disqualified (3a, 5a-6a, 8a-9a).

Now, on appeal, the respondent is attempting to deny the fact that it medically disqualified the petitioner. The respondent cannot evade the consequences of its undisputed testimony at trial, and the petitioner respectfully requests that this Court recognize the fact of the petitioner's medical disqualification.

Respectfully submitted,

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